NOS. 162, 163, 164

In the

Supreme Court of the United States

OCTOBER TERM, 1955

No. 162

EAST TEXAS MOTOR FREIGHT LINES, INC., *et al.*,
Appellants,

v.

FROZEN FOOD EXPRESS, *et al.*,
Appellees.

No. 163

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

FROZEN FOOD EXPRESS, *et al.*,
Appellees.

No. 164

AKRON, CANTON AND YOUNGSTOWN RAILROAD COMPANY, *et al.*,
Appellants,

v.

FROZEN FOOD EXPRESS, *et al.*,
Appellees.

BRIEF FOR THE APPELLEE, FROZEN FOOD EXPRESS

CARL L. PHINNEY,
617 First National Bank Building,
Dallas 2, Texas,
Counsel for Appellant.

Of Counsel:
PHINNEY AND HALLMAN,
Dallas, Texas.

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Appellees.

On Appeal from the United States District Court for the Southern District of Texas, Houston Division

BRIEF FOR THE APPELLEE, FROZEN FOOD EXPRESS

OPINION BELOW

The opinion of the United States District Court for the Southern District of Texas, Houston Division (Three Judge

Court, January 26th, 1955 (R. 50-60) is reported at 128 Fed. Supp., page 374.

JURISDICTION

The Judgment of the United States District Court for the Southern District of Texas, Houston Division, was entered January 26th, 1955 (R. 60-61). Notice of Appeal was filed on April 20th, 1955, in the District Court of the United States for the Southern District of Texas. The Jurisdiction of this Court rests on Title 28, U. S. C., Sec. 1253 and Sec. 2101(b).

STATEMENT

Appellee Frozen Food Express brought this complaint in the District Court of the United States for the Southern District of Texas, Houston Division (July 12th, 1954), alleging that it desired to transport agricultural commodities (not including manufactured products thereof) for hire, to and from all points within the United States, notwithstanding the limitations imposed by its own certificate, and seeking to enjoin an Order of the Interstate Commerce Commission dated July 13th, 1954 (R. 6-16), which Order directed Appellee Frozen Food Express to cease and desist certain operations in the transportation of fresh and frozen meats and fresh and frozen dressed poultry until appropriate authority could be obtained from the Interstate Commerce Commission.

Plaintiff is a common carrier by motor vehicle in interstate and foreign commerce and is the owner and holder

of Certificates of Public Convenience and Necessity No. MC-108207 and issued by the Interstate Commerce Commission under the provisions of the Interstate Commerce Act, Parts I and II, authorizing the transportation of certain commodities between points and places in the states of Arizona, Arkansas, California, Colorado, Illinois, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, New Mexico, Oklahoma, Tennessee, Texas and Wisconsin.

Appellee has transported in the past, in addition to these commodities authorized to be transported by the Interstate Commerce Commission as a common carrier motor carrier since the enactment of Part II of the Interstate Commerce Act, Title 49, 303(b)(6), certain commodities consisting of agricultural commodities (not including manufactured products thereof) between various points in the United States. On such occasions when the vehicles of plaintiff were transporting agricultural commodities such motor vehicles were not transporting any other property or passengers for compensation or hire. That included in such transportation, plaintiff has transported fresh meat, frozen meat, fresh dressed poultry and frozen dressed poultry, it being the interpretation of plaintiff that said commodities are within the intendment of the broad exemption of agricultural commodities (not including manufactured products thereof) as specified in the Act.

On December 23rd, 1953, there was filed before the Interstate Commerce Commission a complaint by East Texas Motor Freight Lines, a corporation of Dallas, Texas,

Gillette Motor Transport, Inc. of Dallas, Texas, and Jones Truck Lines, Inc. of Springdale, Arkansas, alleging that Frozen Food Express, Appellee herein, had been engaged in the transportation of fresh and frozen meats, meat products and dressed poultry, from, to and between points not authorized in any certificate held by it and sought an Order requiring Frozen Food Express to cease and desist from the alleged unlawful and unauthorized operations, etc.

The final Judgment (R. 60, 61) enjoined and restrained the Interstate Commerce Commission from enforcing the Order of July 13th, 1954, insofar as the Order required the Frozen Food Express to cease and desist from transporting, or interfering with its transportation of, fresh and frozen dressed poultry in Interstate commerce for compensation unless the motor vehicle used in the carrying of such poultry is at the same time being used to carry for compensation passengers or other property, not within the exemption provided in Section 203(b)(6) of the Interstate Commerce Act (49 U. S. C. 303(b)(6).

In the answer filed by the United States of America in Cause No. 158, the United States averred that the findings of the Commission in the Determination Order holding that the following commodities are not exempt, were not based on substantial evidence contained in the record, and such findings were arbitrary, unreasonable and unjust and are null and void: (1) slaughtered meat animals and fresh meats; (2) dressed and cut-up poultry, fresh or frozen; (3) feathers; (4) raw shelled peanuts and raw shelled nuts; (5) hay, chopped up fine; (6) re-dried tobacco leaf;

(7) cottonseed hulls and linters; (8) frozen cream, frozen skim milk and frozen milk; (9) seeds which have been deawned, scarified or innoculated (R. 24). (Cause No. 158.) Likewise, the Interstate Commerce Commission in its brief, page 10, set forth the position of the various parties in a tabular form.

ARGUMENT

We have involved here the transportation of fresh or frozen dressed poultry and fresh or frozen dressed meat as these commodities relate to agricultural exemptions. Poultry is an agricultural commodity because the chicken was an agricultural commodity before it was killed. Does the fact that it is slaughtered, dressed and transported, fresh or frozen, transform it into a manufactured product?

As originally enacted in 1935, Section 203(b)(6), contained an exemption in transportation performed by motor vehicles used exclusively in carrying livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof). In 1938 the Section was amended to read "motor vehicles used in carrying property consisting of livestock, fish (including shell fish) or agricultural commodities (not including the manufactured products thereof) if such motor vehicles are not used in carrying any other property or passengers for compensation." In 1940, the word "livestock" in the exemption was modified to read "Ordinary Livestock." The term ordinary livestock was previously defined in Section 20(11) of the Act as "all cattle, swine, sheep, goats, horses and mules,

except such as are chiefly valuable as breeding, racing, show purposes or other special uses." Prior to the adoption of the 1940 amendment, the Interstate Commerce Commission had included poultry as livestock. After the 1940 amendment it classified it as an agricultural commodity. *Monarch Case, 44 M. C. C. 18.*

It is the contention of Appellee that poultry is an agricultural commodity and that dressed poultry, fresh and frozen, has not been manufactured and therefore it comes within the exemption of the Interstate Commerce Act, Part II, 49 U. S. C. A., Section 303(b)(6).

The word "manufactured" has been defined in a number of cases involving issues similar to the issue here. In *Frazee v. Moffitt, 18 Fed. 584, 587 (C. A. 2)*, it was contended that hay is a manufactured article; that hay is a different or new article transformed from grass, as much as sugar is from the cane juice or the maple sap, or as salt is from the saline brine; that the heat of the sun, and the air, and human skill and labor manufacture the grass into hay. In this case, involving the import duty to be paid on manufactured or unmanufactured articles, the Court concluded that hay is not a manufactured article. Judge Blatchford (in the same year that he became a Justice of the Supreme Court) stated *(18 Fed. at 587)*:

> "Many articles are properly called raw which have undergone some manipulation. Cotton is picked from the bolls, and cleaned by ginning, and baled. Yet it is raw cotton in the bale. Wheat is cut, and the grains are threshed out, and then subjected to a cleaning machine, and then bagged. Yet it is raw wheat in the bag. So

with other grains. The cotton and the grains undergo such change and preparation as exposure to light, and natural or artificial heat * * *. Yet neither the cotton nor the grains would be said to be manufactured. Salt and sugar are new articles. Cotton and grains are the same articles they were on the plant with its roots in the earth. So hay is the same article it was when it was stalks of grass with roots in the earth. It is dried to be sure; but the drying and any conversion of starch into sugar are mere incidents of the necessary cutting to enable it to be stored for food in latitudes where grass cannot be found all the year round. Where it can be found no hay is stored. Dried apples would not be called a manufactured article, though the apple is peeled and cored and sliced, and dried by exposure to the sun and manipulation. The substance of dried apples is still apples. The substance of dried grass or hay is still grass."

Similarly, it has been recognized that redried tobacco is an agricultural commodity and not a manufactured product. *Interstate Commerce Commission v. Yeary Transfer Co., Inc., 104 F. Supp. 245 (E .D. Ky.), affirmed, 202 F. 2d 151 (C. A. 6); Gray v. R. J. Reynolds Tobacco Co., 200 Ky. 47, 252 S. W. 134; P. Lorrilard Co. v. Ross, 183 Ky. 217, 209 S. W. 39; American Tobacco Co. v. City of Bowling Green, 181 Ky. 416, 205 S. W. 570.* In *Interstate Commerce Commission v. Yeary Transfer Co., Inc., 202 F. 2d 151 (C. A. 6)*, the Court rejected the Commission's contention that the processing of tobacco, in machinery costing from $35,000.00 to $75,000.00, for the purpose of removing the moisture from the leaf and standardizing the moisture content, converted the leaf tobacco into a manufactured product within the meaning of Section 203(b)(6) of the Act.

In *Hartranft v. Wiegmann, 121 U. S. 609*, sea shells had been subjected to processing whereby two or three layers of each shell were removed, the inner shell was polished on an emery wheel, and mottoes were etched on the polished inner shell. The Court concluded that the processing involved no significant morphological change in the shells; and in this case under the Tariff Act it was held that the shells were not manufactured articles. The basis of the decision is as follows *(121 U. S. at 615)*:

> "We are of the opinion that the shells in question here were not manufactured, and were not manufactures of shells * * * but were shells not manufactured, and fell under that designation in the free list. They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character or use from that of a shell. The application of labor to an article, either by hand or by mechanism, does not make the article necessarily a manufactured article * * *. Washing and scouring wool does not make the resulting wool a manufacture of wool. Cleaning and ginning cotton does not make the resulting cotton a manufacture of cotton."

In *Anheuser-Busch Assn. v. United States, 207 U. S. 556*, corks had been placed in a machine where blasts of air removed the dust, meal, bugs, and worms. Next, the corks were thoroughly cleansed by washing and steaming to remove the tannin and germs and to make the corks soft and elastic. They were then placed in a drying machine until they were thoroughly dry. Finally, the corks were bathed in glycerine and alcohol to close all of the seams, holes, and crevices and to give the corks a coating to prevent the

bottled beer from acquiring a cork taste. The Court held that such processing did not make the corks manufactured articles. In this case, the Court stated, *207 U. S. at 562:*

> "The words of the statute are indeed so familiar in use and of meaning that they are confused by attempts at definition. Their first sense as used in fabrication or composition—a new article is produced of which the imported material constitutes an ingredient or part. When we go further than this in explanation we are involved in refinements, and in impracticable niceties. Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor and manipulation. But something more is necessary * * *. There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use.' This cannot be said of the corks in question. A cork put through the claimant's process is still a cork."

Dressed lumber, i.e., lumber that had been planed, grooved, and tongued or veaded, is not a manufactured article. *United States v. Dudley, 174 U. S. 670.* Such processing of the lumber does not convert the boards and planks into a different article. Similarly, hard wood sticks about one inch in diameter, which are trimmed and peeled, and which have the rough places removed and the ends rounded are not manufactured articles. *United States v. Knipscher & Maas Silk Dyeing Co., 152 Fed. 590 (S. D., N. Y.)*

An orange that has been immersed in a solution to impregnate the rind with borax, thereby rendering it resistant to decay, is not a manufactured article since the orange "remains a fresh orange fit only for the same bene-

ficial uses as theretofore." *Fruit Growers, Inc. v. Brogdex Co., 283 U. S. 1, 11-13.* Round copper plates cut from rolled sheets of copper and turned up four to five inches at the edges are not manufactured articles. *United States v. Potts, 5 Branch 284.* A compress plant which receives bales of cotton in their original state and compresses, rebinds, and recovers the bales, changing the form, size and condition of the bales so that they are suitable for convenient transportation is not a manufacturing plant. *City of Memphis v. St. Louis and S. F. R. Co., 183 Fed. 529 (C. A. 6).* Although each of these articles is processed to put it in a marketable condition, none is manufactured since no new or different article is created.

The fact that machinery is used in the processing of the poultry does not transform the processing operation into a manufacturing operation. Congress intended that ginned cotton would be exempt as an unmanufactured agricultural commodity (see also *State v. Tuscaloosa Cotton Seed Oil Co., 208 Ala. 610, 95 So. 52),* and elaborate and expensive machinery is used in the ginning process. Pasteurized milk is also exempt as an unmanufactured agricultural commodity even though costly machinery is used to process the milk. (See also *City of Louisville v. Ewing Vol-Allmen Dairy Co., 268 Ky. 652, 105 S. W. 2d 801; City of Richmond v. Richmond Dairy Co., 156 Va. 63, 157 S. E. 728; People v. Sohmer, 218 N. Y. 199, 112 N. E. 755;* and *People v. R. F. Stevens Co., 165 N. Y. S. 39, appeal dismissed, 221 N. Y. 622, 117 N. E. 1079.)* Similarly, corporations employing steam engines,

boilers, machinery and ice tools to cut ice from frozen ponds are not manufacturing corporations since they are merely appropriating an article from nature, and although they process the ice to put it into a marketable condition, they do not produce a new article. *People v. Knickerbocker Ice Co., 99 N. Y. 181; 1 N. E. 669;* and *Hittinger v. Westford, 135 Mass. 258.* (See also *Commonwealth v. Lowry-Rodgers Co., 279 Pa. 361, 123 Atl. 855* (removing the outer skins from coffeebeans and roasting the beans, thereby changing their color, size, and chemical composition is not manufacturing; In re *Elk Park Mining & Milling Co., 101 Fed. 422 (D., Colo.)* (mining company is not a manufacturer); *Commonwealth v. John T. Dyer Quarry Co., 250 Pa. 589, 95 Atl. 797,* and *Schumacher Stone Co. v. Tax Commission of Ohio, 134 Ohio St. 529, 18 N. E. 2d 405* (corporations using stone crushers, boilers, engines, elevators, and screens merely process stone into a marketable condition but do not manufacture a new article); *Commonwealth v. Sunbeam Water Co., 284 Pa. 180, 130 Atl. 405* (distilled water is not manufactured); *Cleveland-Cliffs Iron Co. v. Glander, 145 Ohio St. 423, 62 N. E. 2d 94* (standardizing the mineral content of ores by combining them and removing the foreign material from them is not manufacturing); *Fountain v. St. Joseph Water Co., 352 Mo. 817, 180 S. W. 2d 28* (water processed by filtering, purifying, and sterilizing is not manufactured); *People v. Cross & Brown Co., 232 App. Div. 587, 251 N. Y. S. 138* (printing and developing pictures is not manufacturing);

and *United States v. Stone and Downer, T. D. 40296 12 Ct. Cust. App. 293, 295* (processed wool is not manufactured).

Under the rationale of these cases it is clear that dressed poultry is not a manufactured article. Whether it is "New York dressed," i.e., killed and the blood and feathers removed [*Layout and Operations of Cooperative Poultry Dressing Plants (December 1946), U. S. Department of Agriculture, Farm Credit Administration, Miscellaneous Report No. 101, p. 3*] or subjected to additional "dressing" [the dressing of poultry is explained in detail in *Benjamin, Pierce and Termohlen, Marketing Poultry Products (4th Ed.), p. 139 et seq.*], there can be no doubt that the dressed poultry is in substance poultry. No new article has been manufactured.

The United States District Court for the Northern District of Iowa, Eastern Division, held in this case, after an exhaustive survey of the cases and legislative history, that dressed poultry is an agricultural commodity and not a manufactured product thereof, within the meaning of Section 203(b)(6) of the Act. *Interstate Commerce Commission v. Allen E. Kroblin, Inc., 113 F. Supp. 599.* This is the only judicial precedent on the precise issue as to dressed poultry. [The issue as to whether dressed poultry is an exempt agricultural commodity under Section 203(b)(6) is also raised in *Interstate Commerce Commission v. Woodall Food Products Co., Inc., No. 14560,* in the United States Court of Appeals for the Fifth Circuit (oral argument submitted on October 5, 1953). The District Court, in the *Woodall* case, decided the case on other grounds.]

On 14 October, 1954, the Supreme Court of the United States denied a writ of certiorari in *Interstate Commerce Commission v. Allen E. Kroblin, Inc.*, *U. S.* , *99 Law Ed. Advance P.* . The United States Court of Appeals, Eighth Circuit, on May 11, 1954; had affirmed the decision in the United States District Court for the District of Iowa, *212 Fed. 2d (C. C. A. 8), certiorari denied, 348 U. S. 835.*

(Jones v. Liberty Glass Company, supra.)

> "Laws are to be construed by interpreting their words in their plain and actual meaning ordinary and grammatical sense of their language when the terms are clear and concise."

(Wigg v. United States Dev. 157.)

> "And it would seem to be a most extravagant supposition it could hold that in the enactment of a law affecting the interest of a nation at large the Legislature should select for that purpose language by which the nation or the mass of the people must necessarily be misled. The popular or received import of words furnishes the general rule for the interpretation of public laws * * * and wherever the Legislature adopts such language in order to define or promulge their action or their will the just conclusion from such a course must be that they not only themselves comprehended the meaning of the language they have selected but have chosen it with reference to the non apprehension of those to whom the legislative language is addressed and for whom it is designed to constitute a rule of conduct; namely, the community at large.
>
> "'A stocking decked his brow instead of bay, a cap by night a stocking all the day'."

[*Maillard, et al. v. Lawrence (1853), 16 Howard 249, 260, 14 Law Ed. 925, 930.*]

The issues in this case are closely related to the issues in Cause No. 158 now pending in this Court (Determination of Exempted Agricultural Commodities). A dire need exists for a clear-cut judicial determination of the power and authority of the Interstate Commerce Commission to define what commodities constitute agricultural commodities, as well as a determination of Congressional intent in exempting agricultural commodities from regulation under the Interstate Commerce Act, Part II. It is readily apparent that an area of uncertainty, disagreement and confusion presently exists in this field of transportation. Such areas of dispute and disagreement are reflected in Federal Court decisions, in *Commerce Commission v. Yeary, 104 Fed. Suppl. 245, 202 Fed. 2d 151 (C. C. A. 6); Interstate Commerce Commission v. Kroblin, Inc., 113 Fed. Supp. 559, 212 Fed. 2d 555 (C. C. A. 8); Interstate Commerce Commission v. Weldon, 90 Fed. Supp. 873, affirmed 180 Fed. 2d 367, Certiorari denied 342 U. S. 827.*

That Congress did not intend a strict construction of the agricultural exemption is further supported by the conditions imposed "if such motor vehicles are not used in carrying any other property or passengers for compensation." This is a clear expression that the transportation of agricultural commodities (not including manufactured products thereof) could be hauled by any person, firm or corporation, so long as such motor vehicles were not used

in carrying any other property or passengers for compensation. It is not necessary for the transportation to be performed by a farmer raising livestock and agricultural commodities when moving from farm to market. The exemption was placed in the Act to permit a free and unregulated flow of the items enumerated, including agricultural commodities.

CONCLUSION

Appellee respectfully prays this Honorable Court to affirm the decision of the Court below, enjoining the Interstate Commerce Commission from enforcing its cease and desist order against Appellee, Frozen Food Express when transporting fresh and frozen dressed poultry, if such motor vehicles are not used in carrying any other property or passengers for compensation.

Respectfully submitted,

Carl L. Phinney

CARL L. PHINNEY,
Attorney for Appellee
Frozen Food Express.

Of Counsel:
PHINNEY AND HALLMAN,
617 First National Bank
Building,
Dallas, Texas.

PROOF OF SERVICE

I, Carl L. Phinney, attorney for Frozen Food Express, appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 2nd day of February, 1956, I served copies of the foregoing Brief for Appellee on the several parties hereto as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to James E. Kilday and Charles S. Sullivan, Jr., Esquires, Special Assistants to the Attorney General, U. S. Department of Justice, Washington 25, D. C.; Malcolm R. Wilkey, Esq., U. S. Attorney, Federal Building, Houston, Texas; and by mailing a copy in a duly addressed envelope with airmail postage prepaid to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission by mailing a copy, in a duly addressed envelope with airmail postage prepaid, to Edward M. Reidy and Leo H. Pou, Exquires, at the offices of the Interstate Commerce Commission, Washington 25, D. C.

3. On the following attorneys of record of the intervening complainants, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to Charles W. Bucey, and Walter D. Matson, Esquires, U. S. Department of Agriculture, Washington 25, D. C.

4. On the following attorneys of record for the intervening defendants, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to Peter T. Beardsley and Fritz Kahn, Esquires, American Trucking Association, Inc., 1424 16th St. N. W., Washington 6, D. C.; to Rollo E. Kidwell, Esq., 305 Empire Bank Bldg., Dallas, Texas; Lee Reeder, Esq., 1012 Baltimore Avenue, Kansas City 5, Missouri; James W. Nisbet, 280 Union Station Building, Chicago 6, Illinois; Charles P. Reynolds, Esq., Shoreham Building, Washington 5, D. C.; Carl Helmetag, Esq., Pennsylvania Railroad, 1740 Suburban Station Building, Philadelphia, Pa.; Edwin N. Bell, Esq., Esperson Building, Houston, Texas; J. C. Hutcheson, III, Esq., Esperson Bldg., Houston, Texas; Clarence D. Todd and Dale C. Dillon, Esquires, 944 Washington Bldg., Washington 5, D. C.

Carl L. Shinney

CARL L. SHINNEY.